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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioner,

v.

FIRST NATIONAL BANK AND TRUST CO., ET AL.,
Respondents.

and

AT&T FAMILY FEDERAL CREDIT UNION AND
CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,

v.

FIRST NATIONAL BANK AND TRUST CO., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[*]

The National Association of Federal Credit Unions ("NAFCU") is a non-profit association whose members comprise approximately one thousand federal credit unions located throughout the United States. The members of NAFCU, and the more than 23.9 million member-owners of these credit unions, are adversely affected by the decision below. NAFCU submits this Brief to emphasize the critical significance of this case to the future of the credit union community and to present additional legal reasons why the decision of the court of appeals should be reversed. This Brief is filed with the consents of all parties, which are on file with the Clerk.

NAFCU member credit unions serve 54.9% of all federal credit union members and have $111.5 billion in shares outstanding. NAFCU represents the interests of these credit unions and their members on issues pending in Congress, executive agencies and the courts. A majority of the credit unions represented by NAFCU have been authorized to expand their field of membership pursuant to the multiple occupational group policy of the National Credit Union Administration ("NCUA") which is the focus of this litigation.

SUMMARY OF ARGUMENT

This case involves the legality of the NCUA's application of the "common bond" provision of the Federal

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[*] No counsel for any party had any role in authoring this brief, and no person other than the named *amicus* and its counsel made any monetary contribution to its preparation for submission.

Credit Union Act ("FCUA"), 12 U.S.C. § 1759, in approving requests by federal credit unions to add new employee groups to their field of membership.

I. Banks are not within the zone of interests protected by Section 1759 and therefore lack standing to challenge NCUA's actions. Congress, in adopting the field of membership provision of the FCUA, established a standard to be applied by the regulator in determining whether the proposed credit union would be economically advisable -- that is, whether it could operate safely and soundly. Congress did not intend to protect banks from competition from federal credit unions. Further, the 73rd Congress enacted a number of laws in 1933-34 that restructured the banking industry and subjected surviving banks to an unprecedented degree of federal regulation, in response to concerns that banks had caused and exacerbated the Great Depression. This historical record dispels any notion that the 73rd Congress, in adopting the FCUA, intended to protect banks from competition from infant federal credit unions.

The court of appeals correctly determined that banks were not intended beneficiaries of the FCUA and that Congress was not concerned with their competitive position in enacting the law. These findings should have resulted in dismissal of the case. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987); *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517 (1991). The D.C. Circuit, however, allowed the case to proceed under an alternative test, called the "suitable challenger" doctrine, which erroneously focuses on the effects of giving a particular party standing, rather than focusing on Congressional intent as this Court's decisions require. The court of appeals also misread and misapplied prior "competitor standing" cases, by failing to focus on the "particular provision of law upon which the

plaintiff relie[d]" in those cases. *Bennett v. Spear*, 117 S. Ct. 1154 (1997). Properly analyzed, there is a material difference between the explicit statutory barriers to entry involved in those cases and the common bond provision, which serves as an internal standard for the NCUA to apply in determining whether approval of a credit union application would be economically advisable.

II. On the merits, the court of appeals erred by failing to defer to the NCUA's longstanding interpretation of the field of membership provision, in violation of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The court below found that the intent of Congress was clearly discernible from the text of Section 1759. However, the meaning of the phrase "common bond" is ambiguous and gives NCUA substantial discretion as to how the field of membership provision should be applied to protect the economic viability of proposed credit unions. This ambiguity is clearly demonstrated by the fact that the banks, in opposing *certiorari*, did not rely on the construction the D.C. Circuit thought was plain on the statute's face. Rather, they relied on a different interpretation, which they also insist is plain, but which the court rejected. Where three competing interpretations of the statue are presented, *Chevron* provides that deference is due the NCUA's construction.

In interpreting the common bond provision, the court of appeals failed to consider the principal clause of Section 1759, which grants the NCUA broad discretion to determine, by rule, the appropriate standards for membership in a credit union and explicitly authorizes the NCUA to include "organizations" of people within the field of membership. The court also failed to examine the operation of the common bond provision in the overall context of the FCUA,

where it serves as an administrative test to make certain that a proposed credit union will be safe and sound, rather than as a barrier to competition. The NCUA has made a reasoned determination that permitting additional employer groups to be added to the field of membership of existing credit unions would promote their safety and soundness, by diversifying risk and permitting institutions to take advantage of scale efficiencies. Its interpretation is entitled to deference.

ARGUMENT

I. BANKS LACK STANDING TO CHALLENGE APPLICATION OF THE FIELD OF MEMBERSHIP PROVISION OF SECTION 1759.

Commercial banks do not fall within the zone of interests protected by Section 1759 and therefore lack standing to challenge NCUA's application of the field of membership provision.

A. The Common Bond Provision Does Not Protect Banks from Competition.

The zone of interests test is a prudential limitation on standing, designed to determine whether a particular plaintiff should be heard to complain of a particular agency decision. It focuses exclusively on Congressional intent in enacting the law, in order to "determine whether [these plaintiffs] were meant to be within the zone of interests protected by those statutes." *Air Courier Conference*, 498 U.S. at 524; *see also Clarke*, 479 U.S. at 399 ("the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute"). Whether the plaintiff falls within the zone of interests "is to be determined not by reference to the overall purpose of the

Act in question . . . but by reference to the particular provision of law upon which the plaintiff relies." *Bennett v. Spear*, 117 S. Ct. at 1167.

The court of appeals, upon review of the language and legislative history of Section 1759, determined that the common bond requirement was "designed to benefit the members -- particularly potential borrowers -- of credit unions." *First Nat'l Bank and Trust Co. v. NCUA*, 988 F.2d 1272, 1276 (D.C. Cir. 1993). The court determined that "Congress did not, in 1934, intend to shield banks from competition from credit unions." *Id.* at 1275. It found "no indication that Congress was, at that earlier time, concerned about the competitive position of banks." *Id.* at 1276. Its conclusion agrees with that of the Fourth Circuit, which found that "[t]here is no evidence from any source . . . that Congress also intended by [the common bond] provision to protect the competitive interests of banks." *Branch Bank and Trust Co. v. NCUA*, 786 F.2d 621, 626 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987).

This conclusion is correct. It is sufficient, of itself, to warrant reversal of the decision below for lack of standing, under *Air Courier* and *Clarke*.

Credit unions are membership organizations, which operate on a non-profit basis and are self-governed and self-financed by their member/owners. 12 U.S.C. §§ 1757-1761. The members invest their own money in the entity, in the form of membership shares, and elect their own directors on a one person, one vote basis. Unlike commercial banks, credit unions are not open to any member of the public. Only individuals who fall within a specific field of membership approved by the NCUA may apply for membership. In addition, credit unions may make loans only

to people who have been elected to membership and purchased shares. *Id.* at § 1757(5). Thus, definition of an appropriate field of membership is critical to the operation of these mutual self-help organizations. The common bond clause has been part of the field of membership provision since the FCUA was adopted in 1934.

Section 2 of the original FCUA, 48 Stat. 1216, renumbered Section 102, *as amended by* 12 U.S.C. § 1752, defined a federal credit union as:

> a cooperative association organized . . . for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes.

Section 3 required the original incorporators to prepare an organizational certificate, which among other things "shall specifically state . . . the proposed field of membership, specified in detail." 48 Stat. 1217, renumbered Section 103, *as amended by* 12 U.S.C. § 1753(5).

Section 4 of the FCUA further provided that upon receipt of the organizational certificate, the federal regulator must determine: (1) whether the certificate conforms to the FCUA, which necessarily includes the requirement that the proposed field of membership be described in detail; (2) the general character and fitness of the subscribers; and (3) "the *economic advisability* of establishing the proposed Federal credit union." 48 Stat. 1217, renumbered Section 104, *as amended by* 12 U.S.C. § 1754 (emphasis added).

Finally, Section 9 of the FCUA, 48 Stat. 1219, renumbered Section 109, *as amended by* 12 U.S.C. § 1759,

provided that membership in a federal credit union shall consist of:

> the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the [federal regulator], as may be elected to membership and as such shall each, subscribe to at least one share of its stock . . . except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.

In the structure of the FCUA, the common bond provision of Section 9 is tied directly to the requirement in Section 3 that the incorporators submit to the regulator "the proposed field of membership, specified in detail"; and to the regulator's determination under Section 4, based on that submission and after investigation, about "the economic advisability of establishing the proposed Federal credit union."

The banks' standing to challenge an NCUA field of membership decision is determined by whether their interest falls within the zone of interests protected by Section 1759, the "specific provision which they allege had been violated." *Bennett v. Spear*, 117 S. Ct. at 1167. The field of membership provision, with its common bond component, serves as an internal test the regulator applies to judge the economic feasibility of a proposed credit union. Nothing in the text of Section 9 as adopted in 1934 or the structure of the FCUA suggests that the field of membership provision was intended to protect banks or restrict the degree of competition federal credit unions could offer banks. Rather,

Section 9 operated exclusively as an administrative standard to ensure the regulator considered and approved the "economic advisability" of the proposed credit union -- that is, its safety and soundness. Accordingly, the banks are not within the zone of interests protected by the field of membership provision.

B. The "Suitable Challenger" Rationale Is Inconsistent with This Court's Prior Zone of Interests Decisions.

Despite its conclusion that banks were not intended beneficiaries of Section 1759, the court of appeals nonetheless found that they satisfied the zone of interests test under the "suitable challenger" rationale. This doctrine, unique to the D.C. Circuit, is inconsistent with this Court's zone of interests decisions, notably *Air Courier* and *Clarke*, and cannot provide a lawful basis for bank standing to challenge NCUA field of membership decisions.

1. The "suitable challenger" rationale is fundamentally flawed, because it transforms the nature of the zone of interests inquiry from a determination of Congressional *intent* into an examination of the practical *effects* of granting standing to a party Congress did not intend to protect. In practice, the D.C. Circuit's inquiry is whether the plaintiff's interests are "congruent with those of the intended beneficiaries," 988 F.2d at 1276, in the sense that the resulting pattern of litigation is likely to resemble closely the litigation that presumably would have been filed by the entities Congress actually intended to protect. This Court's decisions provide no justification for such a results-oriented test.

2. The "suitable challenger" doctrine is essentially contentless. It simply provides a catch phrase for articulating a conclusion that a party *should* be granted prudential standing, rather than providing objective criteria that courts may use to make reasoned and consistent decisions about which parties, out of the universe of potential litigants, Congress actually intended to protect. The lack of judicially manageable criteria is demonstrated by the verbal formulas the D.C. Circuit applies in performing this test: whether the interests of the plaintiff are "sufficiently congruent" with those of the intended beneficiaries; and whether recognizing the plaintiff's standing will lead to a "misdirection of the statutory scheme." 988 F.2d at 1279.

3. The "suitable challenger" test is subject to arbitrary application, depending upon how the reviewing court chooses to characterize the effects of the statute and to define the "interests" ostensibly involved. Here, the court of appeals noted that, in furthering the statutory purposes of assuring the economic viability of a credit union and ensuring that it would meet members' borrowing needs, the common bond provision might serve as a limitation on its growth. 988 F.2d at 1277. The court then reasoned that this effect was "akin to entry restrictions", and that this similarity justified application of competitor standing decisions that involved laws which explicitly prevent one type of enterprise from offering a specific product to a particular group of customers. *Id.* However, the D.C. Circuit mischaracterized Section 1759 as involving an entry restriction, so the whole premise for its argument fails.

Each of the persons covered by a multiple employer group is already eligible to receive financial services from a federal credit union, either from an existing institution or from a credit union that could be newly organized. The field

of membership provision, with its common bond subclause, does not confine different types of financial institutions to separate spheres of activity, nor does it divide potential savers into groups who can be served only by credit unions and those who can be served only by banks. In applying the common bond requirement, the issue before NCUA is whether a particular credit union, out of the universe of those potentially eligible, ought to be authorized to offer its services to a particular group of savers, factoring in safety and soundness considerations. Thus, the court of appeals erred in finding that Section 1759 created an entry barrier or a "picket line" akin to the explicit prohibitions against competition involved in this Court's competitor standing cases.

4. In invoking the competitor standing cases to justify its decision, the court of appeals committed the same mistake this Court warned against in *Bennett v. Spear*. The D.C. Circuit relied on a broad characterization of "the overall purpose of the Act in question", rather than analyzing the Congressional intent underlying "the particular provision of law upon which the plaintiff relie[d]." 117 S. Ct. at 1167.

Each of the decisions the court cited involved an explicit statutory prohibition that prohibited one type of institution -- commercial banks or bank service corporations -- from offering a defined type of financial service to customers.[1/] The D.C. Circuit mischaracterized those

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1/ *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971)(Section 16 of the Glass-Steagall Act, 12 U.S.C. § 24, which provided that a national bank "shall not underwrite any issue of securities or stock"); *Clarke v. Securities Indus. Ass'n*, 479 U.S. at 401-02 (Sections 7 and 8 of the Banking Act, 12 U.S.C. §§ 36, 81,

Footnote continued on next page

decisions as finding standing because of "the congruence of plaintiffs' interests with those of the intended beneficiaries." 988 F.2d at 1276-1277 (discussing *Investment Co. Institute* and *Clarke*). However, such a results-oriented "effects test" or discussion of "congruence" is simply not present in those opinions. In each case, the Court actually found that Congress sought to protect the interest of the would-be plaintiff in adopting an anti-competition prohibition.

In sum, the "competitor standing" cases are not applicable here, because Section 1759 does not constitute the kind of explicit statutory barrier required for a would-be competitor to fall within its zone of interests. To the contrary, this case is controlled by *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). Commercial banks occupy the same position as the reporting service in the Court's hypothetical -- even if they satisfy the "injured in fact" test, they are not "adversely affected" by NCUA's alleged violation of the common bond provision, within the meaning of the zone of interests test. 497 U.S. at 883; *accord Air Courier*, 498 U.S. at 524.

Footnote continued from previous page

which limited "the general business" of a national bank to its headquarters and any "branches" permitted under Section 36); *accord Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970)(Section 4 of the Bank Service Corporation Act, 12 U.S.C. § 1864, which provided that bank service companies may not "engage in any activity other than the performance of bank services for banks").

C. The Legislative History of the FCUA Confirms That Section 1759 Was Intended to Protect the Economic Viability of Credit Unions, Not to Protect Banks from Competition.

The legislative history of the FCUA confirms that Section 1759 was intended to benefit the members of credit unions, rather than protect banks from competition. Indeed, the historical record shows that Congress did not regard credit unions and commercial banks as competitors. For example, the FCUA of 1934 did not even authorize deposit insurance for federal credit unions, even though Congress *required* all national banks to obtain federal deposit insurance as a prerequisite to remaining in operation.

The first credit union organized in the United States was La Caisse Populaire of Manchester, New Hampshire, founded in 1908 by parishioners of St. Mary's Church but open to all residents of the city. The first credit union statute was adopted by Massachusetts in 1909. *See La Caisse Populaire Ste. Marie v. United States,* 563 F.2d 505 (1st Cir. 1977). Thereafter, the credit union movement spread throughout the United States, due primarily to the financial support and evangelical efforts of Edward Filene, a Boston department store magnate.[2/] By 1934, 38 States had adopted laws authorizing establishment of credit unions.[3/]

[2/] *Credit Unions: Hearing before a Subcommittee of the Senate Committee on Banking and Currency*, 73rd Cong., 1st Sess. 18-19 (1933)(hereinafter "*Credit Union Hearing*"); 78 CONG. REC. H12224 (1934).

[3/] H.R. REP. NO. 2021, 73rd Cong., 2d Sess. 2 (1934).

The Great Depression demonstrated the need for federal credit union legislation. Due to the contraction of the money supply, many individuals and small businesses were unable to obtain credit from commercial banks at any terms, and were forced to borrow from usurers and loan sharks.[4/] Massive bank failures in 1932-33 also resulted in substantial losses for millions of people whose deposits were not insured. In this climate, credit unions emerged as an attractive means of stimulating saving and extending credit to individuals of small means who could not obtain these services elsewhere. However, credit unions were not permitted in ten states, and their formation was discouraged in other states by ineffective authorizing statutes or discriminatory taxes.[5/] In 1932, Congress adopted credit union legislation for the District of Columbia. Pub. L. No. 72-190. In June 1933, Congress began considering comprehensive federal credit union legislation modeled on the prior District of Columbia legislation.[6/] Finally, in June 1934, Congress adopted the FCUA, Pub. L. No. 73-467.

The FCUA was intended to preserve the purchasing power of consumers, and allow them to participate in the recovery, by eliminating

> usurious interest money lending in the only way it can be done, namely, by enabling the average man to combine with his fellows to the end that, working

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[4/] S. REP. NO. 555, 73rd Cong., 2d Sess. 3-4 (1934).

[5/] S. REP. NO. 555, *supra*, at 4.

[6/] S. REP. NO. 555, *supra*, at 2.

together, they may solve their own short-term credit problems at normal rates.[7/]

On the Senate floor, credit unions were described as a "happy medium between the loan shark and the bank, which cannot extend credit to many of these people [of ordinary means], because they do not have the required security."[8/] In House debate, Banking and Finance Committee Chairman Steagall stated that credit unions "are not comparable in the matter of their resources and the nature of the organization and the service they render to the institutions [national banks] that are supervised by the Comptroller of the Currency."[9/]

Congress regarded commercial banks and mutual associations of savers as fundamentally different businesses, and believed that federal credit unions would remedy a flaw in the structure of the financial industry by serving an unmet need.[10/] This point is dramatically illustrated by the fact that Congress, in the Banking Act of 1933, required all surviving national banks to obtain deposit insurance from the Federal Deposit Insurance Corporation, upon condition of satisfying the agency's financial safety criteria. The same Congress, however, did not provide deposit insurance for credit unions.

7/ 78 CONG. REC. S7260 (1934).

8/ 78 CONG. REC. S7259 (1934).

9/ 78 CONG. REC. H12224 (1934).

10/ "These credit unions, nationally extended, will close the great gap in the credit structure, a gap which leaves men and women of small means . . . largely at the mercy of usurious money lenders." 78 CONG. REC. S7259 (1934)(Senator Shepard).

This action demonstrates that Congress regarded these infant non-profit mutual assistance organizations as a different type of institution, involving materially different risks, from commercial banks.

D. Other Actions Dispel the Notion That the 73rd Congress Intended to Protect Banks from Competition by Credit Unions.

The 73rd Congress believed that commercial banks were partly responsible for triggering the Depression and imposed severe federal regulation on this industry through the Banking Act of 1933 to prevent the recurrence of these events. The historical record of actions taken by this Congress to confine and regulate the banking industry contradicts the banks' current argument that the Court should read into the FCUA a Congressional intention to protect commercial banks from competition by the infant federal credit unions.

In the early 1930s, commercial banks were perceived, both by the public and Congress, as having fostered the stock market crash and the Depression through reckless lending to speculative ventures and ill-considered participation in the securities markets.[11/] Further, waves of bank failures over several years inflicted multi-billion dollar losses on uninsured depositors and creditors of banks. Approximately one-fifth of all commercial banks, holding nearly one-tenth

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11/ Anna J. Schwartz, *Financial Stability and the Federal Safety Net*, *in* RESTRUCTURING BANKING AND FINANCIAL SERVICES IN AMERICA 34 (William S. Haraf and Rose Marie Kushmeider eds. 1988).

of all deposits, suspended operations between 1929 and 1933.[12/]

The United States experienced an initial wave of bank failures in October 1930 and a second wave in March 1931. These crises prompted depositors to make large-scale withdrawals from surviving banks. In response, banks sought to strengthen their reserves by liquidating investments and refusing to renew loans as they came due, in order to meet the public demand for currency. These actions had a multiplier effect on the contraction of the money supply, reduced asset prices, and deepened the Depression. Finally, the so-called "Bank Panic" struck in late February 1933, just prior to the inauguration of President Roosevelt. By March 3rd, banks in half the states had been closed by government order. On March 4th, the State of New York declared a bank holiday, and the Federal Reserve Banks closed. The same day, President Roosevelt specifically criticized the banking industry in his inaugural address. On March 6, he declared a national bank holiday to prevent the spread of the crisis.[13/]

The collapse of the banking system prompted the 73rd Congress to restructure the industry by forcing commercial banks to divest their securities affiliates and by imposing strict regulatory controls on surviving banks, in return for the

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12/ MILTON FRIEDMAN AND ANNA JACOBSON SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES 299, 351 (1963).

13/ EDWARD L. SYMONS, JR. AND JAMES J. WHITE, BANKING LAW 35 (1991); FRIEDMAN AND SCHWARTZ, *supra*, at 308, 311, 313, 420-422.

grant of deposit insurance.[14/] On June 13th, both Houses of Congress passed the Banking Act of 1933, which was signed by the President on June 16th. Pub. L. No. 73-66, 48 Stat. 162. This law included four provisions, known collectively as the Glass-Steagall Act (Sections 16, 20, 21 and 32, 12 U.S.C. §§ 24, 377, 378, 78), which mandated separation of commercial and investment banking.[15/] That law also severely regulated the activities of open banks by, *inter alia*, prohibiting the payment of interest on demand deposits and

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14/ Support for the legislation was generated in hearings before the Senate Committee on Banking and Currency, which became known as the "Pecora hearings" after the subcommittee chief counsel. *Stock Exchange Practices: Hearings Before the Senate Comm. on Banking and Currency on S. Res. 84 and S. Res. 56*, 73d Cong., 1st Sess. (1933). These hearings highlighted objectionable practices by the banks and their affiliates, and became "a conduit for populist sentiment to punish Wall Street." *See* Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUMBIA L. REV. 10 (1991); A. SCHLESINGER, THE AGE OF ROOSEVELT -- THE COMING OF THE NEW DEAL 435-38, 442-445 (1958); R. LITAN, WHAT SHOULD BANKS DO? 27 (1987); RON CHERNOW, THE HOUSE OF MORGAN 366-367 (1990).

15/ For example, Senator Glass of the Banking and Currency Committee asserted that "one of the greatest contributions to the unprecedented disaster which has caused this almost incurable depression was made by these bank affiliates." 75 CONG. REC. 9887 (1932). House Banking and Currency Committee Chairman Steagall stated that prior to the stock market crash, "[o]ur great banking system was diverted from its original purposes into investment activities, and its service devoted to speculation in international high finance." 77 CONG. REC. 3835 (1933).

imposing stringent eligibility standards for deposit insurance. FRIEDMAN AND SCHWARTZ, *supra*, at 442-443.[16/]

The same committees that drafted the Glass-Steagall Act also prepared the Federal Credit Union Act. Indeed, a subcommittee of the Senate Banking and Currency Committee held its first hearing on the FCUA on June 1, 1933, while that committee was involved in devising the final version of the Glass-Steagall Act. *Credit Union Hearing, supra*. The committees, in drafting the FCUA, were concerned with two issues: whether federal credit unions could help defeat the abuses of loan sharking; and whether they would be financially stable. Credit union supporters demonstrated that they could make loans to people of ordinary means at rates far less than those charged by loan sharks.[17/] Proponents also demonstrated that no

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16/ This Court previously has recognized the anti-bank sentiment of the 73rd Congress. *Investment Co. Inst. v. Camp*, 401 U.S. at 634, 639. In *Board of Governors of the Fed. Reserve Sys. v. Investment Co. Inst.*, 450 U.S. 46, 61 (1981), the Court found that:

> the Glass-Steagall Act was enacted in 1933 to protect bank depositors from any repetition of the widespread bank closings that occurred during the Great Depression. Congress was persuaded that speculative activities, partially attributable to the connection between commercial banking and investment banking, had contributed to the rash of bank failures. (Footnote omitted).

17/ At the time Congress voted on final passage of the FCUA, twenty states had adopted legislation *limiting* the amount finance companies could charge small borrowers to 42% per annum. 78 CONG. REC. S7259, H12223.

credit unions had failed during the Depression.[18/] Neither the Committee Reports nor the statements in the floor debates on the FCUA indicate any concern over competition between commercial banks and federal credit unions, much less a concern to limit the field of membership of credit unions to protect banks from competition.

This historical record thus refutes any suggestion that, in adopting the FCUA, the 73rd Congress abandoned its antagonistic attitude toward the banking industry and sought to protect this dominant industry from infant federal credit unions.

II. SECTION 1759 AUTHORIZES NCUA TO ADD MULTIPLE EMPLOYER GROUPS TO EXISTING CREDIT UNIONS TO ENHANCE THEIR SAFETY AND SOUNDNESS.

The court of appeals violated *Chevron* by failing to defer to the NCUA's reasonable interpretation of the field of membership provision, including its common bond subclause. In devising an interpretation of the law that allegedly was "clearly discernible," but had not been advocated by any party, the D.C. Circuit ignored the principal part of Section 1759. *First Nat'l Bank and Trust Co. v. NCUA*, 90 F.3d 525, 527 (D.C. Cir. 1996). The independent clause in that provision grants the NCUA substantial discretion in defining the membership of credit unions and expressly permits separate organizations to join a single credit union. The court also failed to consider the

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18/ *Credit Union Hearing, supra*, at 19-20; S. REP. NO. 555, *supra*, at 2; 78 CONG. REC. H12223 (1934)(remarks of Banking and Currency Committee Chairman Steagall).

interrelationship between Section 1759 and other parts of the FCUA. Considering all parts of the law in context, the common bond provision is a flexible standard designed to ensure the safety and soundness of credit unions, whose application may be varied as conditions require, rather than an unambiguous commandment having a fixed, narrow meaning.

A. The Statutory Provision Is Ambiguous.

On its face, the term "common bond" is ambiguous and has no established meaning. The phrase is not further defined in the FCUA. Nor was it a term with a standard meaning in the financial services industry. The court of appeals itself recognized that "[n]either syntactical argument" presented by the opposing parties about the meaning of this term "is convincing." 90 F.3d at 528. This finding itself suggests that there is an ambiguity in the statutory language, which Congress meant the regulatory agency to fill.

The clearest proof that the phrase "common bond" is ambiguous is presented by the pleading the banks already have filed in this Court. The D.C. Circuit discovered an interpretation of the common bond provision that differed from those offered by the NCUA and the banks. In opposing the petitions for *certiorari*, the banks did not rely upon the construction articulated by the court of appeals, but fell back upon the interpretation that they had argued below -- and which the court rejected.

In addition, the fact that the district court in this case, the district court in the Sixth Circuit case, and the dissenting judge in the Sixth Circuit agreed with the NCUA's interpretation is further evidence that the term does not have

a narrow, fixed meaning.[19/] Judge Jones, dissenting in the Sixth Circuit, correctly concluded that:

> The common bond provision can be read one of two ways. Either the provision requires that each group in a credit union have a common bond with the other groups in the credit union, or the provision requires that each group joining a credit union have a common bond among the members of the group, but not necessarily a common bond with the other groups in the credit union. The statute does not clearly establish the unambiguous congressional intent concerning the common bond requirement and determine which reading of the statute is appropriate.

1997 WL 175314 at *8.

In sum, this Court is presented with three different interpretations of the meaning of "common bond": one adopted by the NCUA, one advocated by the banks, and one the D.C. Circuit discovered and the Sixth Circuit endorsed. This pattern demonstrates by itself that the phrase is ambiguous. In these circumstances, *Chevron* provides that the Court should defer to the agency's interpretation.

19/ *First City Bank v. National Credit Union Admin. Bd.*, 1997 WL 174314 (6th Cir. 1997) (Jones, J. dissenting); *see Smiley v. Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1732-1733 (1996).

B. The Court of Appeals Ignored the Principal Part of Section 1759.

The court of appeals did not discuss the primary part of Section 1759, which constitutes an independent grant of authority to NCUA to define the appropriate field of membership of a credit union, and to authorize multiple "organizations" to come together to form a single credit union. The court thereby ignored two important provisions of the statute, which directly contravene its interpretation of the text. It thus erred in deriving a "clearly discernible" meaning from an incomplete text. *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 113 S. Ct. 2173, 2182 (1993)("Statutory construction . . . at a minimum, must account for a statute's full text").

1. Section 1759 provides that federal credit union membership shall consist of "the incorporators and such other persons and *incorporated and unincorporated organizations*" as may be elected to membership and purchase "at least one share" of the credit union's stock. (Emphasis added). The plural noun "groups" in the dependent clause (the common bond provision) refers back to the plural noun "organizations" in the independent clause of Section 1759.

By authorizing multiple "organizations" to come together to form a single credit union, the plain language of Section 1759 supports the NCUA's position that Congress permitted membership in a single credit union to be open to multiple employee groups, each of which is organized along its own internal lines, and which may come together with other organized groups of saver/owners to establish a cooperative institution to promote thrift. Nothing in this language, authorizing several organizations to come together

in one credit union, suggests that Congress intended to limit workers' rights of free association so that they could engage in cooperative self-help measures only with others employed by the same company or within the same industry segment.

2. Section 1759 further provides that federal credit union membership shall consist of "the incorporators and such other persons and incorporated and unincorporated organizations, *to the extent permitted by rules and regulations prescribed by the Board*," as may be elected to membership and purchase shares. (Emphasis added). This specific grant of authority to define, by rule, which persons should be permitted to join an individual credit union is distinct from the general rulemaking authority granted the regulator under the original Section 16 of the FCUA, 48 Stat. 1221 (codified at 12 U.S.C. § 1766(a)). The inclusion of this specific rulemaking authority therefore suggests that Congress vested the NCUA with considerable discretion to determine the field of membership that would be appropriate under various conditions. *See Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Syst.*, 468 U.S. 207, 214 (1984). Accordingly, the NCUA's field of membership policy is entitled to substantial deference. *Id.* at 215-216.

C. The Court of Appeals Ignored the Statutory Context in Which the Field of Membership Provision Appears.

The court of appeals also erred by failing to take into account the statutory context in which the field of membership provision appears and the statutory mechanism of which it is an indispensable element. *See Clarke*, 479 U.S. at 401.

1. As discussed above, the FCUA establishes a process and standard by which NCUA may evaluate the proposed field of membership of a new credit union or additions to an existing institution. The statute requires a formal submission to the agency in which the proposed field of membership is described "in detail". Consideration of the proposed field of membership is a mandatory prerequisite to NCUA's approval of the application. The law further prescribes the substantive criterion the NCUA must use in reviewing the field of membership and other parts of the application -- whether creation or expansion of such a credit union is "economically advisable".

Thus, the field of membership provision, including its common bond subclause, factors into a decision making formula designed to ascertain and protect the financial stability of a credit union. The banks' proposed interpretation of the common bond subclause would divert the field of membership inquiry from its original function, and transform the test to serve a substantially different end from the one Congress defined.[20/]

2. From its inception, the field of membership provision and its common bond component were tied closely to protection of the economic viability of a credit union. The

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20/ At various times, the banking industry has pointed to the common bond provision as a device Congress included to limit competition banks experience from credit unions, to offset the competitive advantage credit unions allegedly receive from their tax-exempt status. This cannot be the case, however, because federal credit unions were not granted tax exemption until 1937, Pub. L. No. 75-416, 51 Stat. 4, three years after the common bond component was enacted.

original language of Section 4, as it first passed the Senate (S. 1639), mirrored exactly the counterpart language of the 1932 law which authorized credit unions in the District of Columbia. Pub. L. No. 72-190, § 4(3), 47 Stat. 326, 327. Section 4(3) originally provided that the regulator was to determine whether the certificate of incorporation conformed to the provisions of the Act, the fitness of the subscribers, and "the advisability of establishing a Federal Credit Union in the proposed field of membership." 78 CONG. REC. S8459 (1934).

The House replaced S. 1639 with its own version of the FCUA, which contained minor modifications. One amendment changed the "advisability" language in Section 4(3) into the final version enacted into law, which required the regulator to determine the "economic advisability of establishing the proposed Federal credit union." 78 CONG. REC. H12222 (1934). Through this change, Congress focused the application of the field of membership provision, including its common bond component, even more closely on protecting the economic viability of the credit union.

Accordingly, the legislative history confirms the meaning that is explicit in the structure of the FCUA, that the NCUA's consideration of the composition of the membership of a proposed credit union serves to protect the economic safety and soundness of the institution.

D. The Court Should Defer to the NCUA's Interpretation of the FCUA.

Chevron and its progeny establish that when the language of a regulatory statute is ambiguous, the courts should defer to the interpretation of the law adopted by the agency, as long as that construction is reasonable. Many of

the cases applying that doctrine involve decisions where the Court unanimously upheld agency interpretations that allowed commercial banks to expand the types of financial services they may offer customers, over opposition from other segments of the financial services industry.[21/]

The court of appeals should have followed the principle of deference in this case. The banks have erroneously argued that a broad statutory term in the FCUA is unambiguous and permits of only one possible meaning, no matter how much market conditions may change. The narrow interpretation the banks propose would deprive millions of Americans access to affordable credit union

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21/ *Smiley v. Citibank (South Dakota), N.A.*, 116 S. Ct. at 1730 (upholding under *Chevron* agency interpretation of the term "interest" in the National Bank Act to allow banks to charge late payment fees that were prohibited in the State where the cardholders resided); *Nationsbank of North Carolina, N.A. v. VALIC*, 513 U.S. 251 (1995) (upholding under *Chevron* agency decision that acting as an agent in the sale of insurance was "incidental" to the "business of banking" under the National Bank Act); *Clarke v. Securities Indus. Ass'n*, 479 U.S. at 388 (upholding under *Chevron* agency interpretation of the term "branch" under the National Bank Act as not extending to offices at which banks provide discount brokerage services); *Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 468 U.S. at 207 (upholding agency decision that acquisition of a discount broker was "closely related" to the business of banking, within the meaning of the Bank Holding Company Act, and did not violate Glass-Steagall); *Board of Governors of Fed. Reserve Sys. v. Investment Co. Inst.*, 450 U.S. at 46 (upholding agency decision that acquisition of an investment adviser to a closed-end investment company mutual fund was "closely related to banking", within the meaning of the Bank Holding Company Act, and did not violate Glass-Steagall).

services, especially employees of small businesses. This construction also would deny the NCUA the authority to ensure the safety and soundness of the credit union system, by depriving individual credit unions of the diversity in membership necessary to minimize risk and avoid the adverse effects of a downturn in the business affairs of a single underlying company or business. Finally, the banks' reading would deprive credit unions, alone among all classes of federally insured financial institutions, of the ability to take advantage of the economies of scale that are essential to providing their services to members in a cost-effective manner.

Among consumers, employees of small businesses will be especially harmed by the D.C. Circuit's narrow reading of the common bond requirement. Under its interpretation, many employers will be too small for their workers to support a viable credit union. NCUA has concluded that, for safety and soundness reasons, a federal credit union must have at least five hundred potential members in order to be viable. According to the Small Business Administration, however, in 1994 more than 62% of all American jobs are provided by companies with fewer than five hundred employees.

The D.C. Circuit's failure to follow *Chevron* and defer to the NCUA's interpretation of Section 1759 threatens to deny the right of cooperative financial association to the vast proportion of working Americans. The NCUA's construction of the common bond component was an appropriate exercise of its discretion under a broad statutory provision, under which Congress gave the regulator flexibility to adjust the field of membership of credit unions to preserve safety and soundness in response to changing

economic conditions. The NCUA's interpretation should be sustained.

CONCLUSION

For the reasons set forth above, the decision of the court of appeals should be reversed.

Respectfully submitted,

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